U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 February 2006

CASE NO.: 2004-LHC-2747

OWCP NO.: 07-167815

IN THE MATTER OF:

WILLIE B. RICHMOND

Claimant

v.

NORTHROP GRUMMAN SHIP SYSTEMS

Employer

APPEARANCES:

Joseph G. Albe, ESQ.

For The Claimant

Paul B. Howell, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Willie B. Richmond (Claimant) against Northrop Grumman Ship Systems (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on May 24,

2005, in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 8 exhibits, Employer proffered 21 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and the Employer. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That Claimant's injury occurred during the course and scope of her employment with Employer, if an accident/injury occurred.

2. That there existed an employee-employer relationship at the time of the accident/injury.

3. That the Employer was notified of the accident/injury on July 29, 2003.

4. That Employer filed a Notice of Controversion on August 25, 2004.

5. That an informal conference before the District Director was held on July 15, 2003.

6. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act, under Claimant's prior injury.

7. That Claimant has been assigned a 20% permanent disability to each leg.

[1] References to the transcript and exhibits are as follows: Transcript: Tr.; Claimant's Exhibits: CX-___; Employer Exhibits: EX-___; and Joint Exhibit: JX-___.

II. ISSUES[2]

The unresolved issues presented by the parties are:

1. Causation; fact of injury.

2. The nature and extent of Claimant's disability.

3. Whether Claimant has reached maximum medical improvement.

4. Intervening cause.

5. Claimant's average weekly wage.

6. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was 52 years old at the time of formal hearing and resided in Gautier, Mississippi. She is a high school graduate. (Tr. 71). Prior to her employment with Employer, she attended Jackson County Junior College for one year, worked as a clerk for Allstate Insurance Company for six months, worked for LaFont Inn, and worked as an insulator for "FrigiTemp." (Tr. 71-72). Employer hired her as an insulator on May 29, 1979, and she worked in the Insulating Department until her employment ceased on August 18, 2003. (Tr. 54, 72).

Claimant sustained knee injuries while working for Employer in 1984, 1986, 1996, and 2003. (Tr. 42). For over 20 years, she treated with Dr. Edmund Dyas. On September 6, 1984, Dr. Dyas performed arthroscopic surgery on Claimant's left knee and, in 1985, he released her at maximum medical improvement with a 5% disability to her leg. Dr. Dyas did not assign any work restrictions and Employer compensated Claimant for her disability. (Tr. 73). On September 4, 1986, Claimant again injured her knees, but did not undergo additional surgery. Dr.

[2] In a letter dated May 23, 2005, Employer stated that it did not plan to raise a Section 8(f) issue at formal hearing, but reserved its right to raise the issue at a later date if Claimant has not reached maximum medical improvement. At formal hearing, Employer withdrew the issue of Section 8(f). (Tr. 5-6). Accordingly, I decline to consider the issue of Section 8(f) relief in the instant matter.

Dyas assigned restrictions as a result of the injury and recommended Claimant change jobs. Claimant continued working as an insulator. (Tr. 74-75).

At some point, Claimant attended secretarial school, but could not find a secretarial job. On January 9, 1990, she returned to work with Employer. (Tr. 75). Claimant sought treatment for problems with her hands, as well as for neck and shoulder problems due to a ruptured disc. (Tr. 45). She testified that she had surgery for carpal tunnel in 1994, but agreed on cross-examination that she underwent a carpal tunnel release on her right hand in October 1992 and underwent a carpal tunnel release on her left hand in 1993.[3] (Tr. 77). In 1994, Dr. Dyas performed surgery on her left knee. (Tr. 63). On February 20, 1996, Claimant injured both knees and again sought treatment with Dr. Dyas. (Tr. 77).

In 1997, Employer provided a permanent light duty position in its "wet dock building," which complied with the restrictions provided by Dr. Dyas and paid Claimant's regular wage. (Tr. 43, 78). Her restrictions included lifting of no more than 30 pounds, no overhead work, no climbing, stooping, or working directly on her knees, i.e. kneeling or bending. (Tr. 57-58). She continued to experience knee pain because she had to climb up and down steep stairs to get to and from the bathroom facilities and she presented to Dr. Dyas with complaints of knee pain in April 2003. (Tr. 79, 81).

On June 30, 2003, Employer placed Claimant "on the ship" and her duties included climbing ladders, carrying tools while climbing stairs, crawling, stooping, bending, and working on her knees. These activities did not comply with the restrictions assigned by Dr. Dyas and Claimant complained to her supervisor, Mike Porter, and Labor Relations. (Tr. 42-43, 83). She had difficulty climbing the stairs on the ship because of the steepness hurt her knees. (Tr. 48).

On July 25, 2003, Claimant reported to her work area with Ms. Billy Davis. They alternated turns climbing up ladders or on equipment until Claimant stated that her knees hurt badly. Ms. Davis agreed to allow Claimant to work on the floor. At approximately 12:00 p.m., Claimant could barely walk and informed her supervisor, Mr. Clausell, that she had to go home.

[3] Claimant filed claims for her neck and carpal tunnel conditions, which were settled for approximately $11,000.00. (Tr. 76). Aside from Claimant's testimony, the record contains no evidence regarding settlement of any claims.

(Tr. 48-49, 88). She did not know whether an accident report was filed. (Tr. 49).

When Claimant returned to work, she asked to go to the hospital and she was sent to Employer's in-house hospital. (Tr. 50, 89). On August 14, 2003, Claimant saw Dr. Dyas, who wrote a letter to Employer regarding her inability to work on ships. (Tr. 51-52). She reported only knee pain to Ms. Davis, Mr. Clausell, Employer's hospital, and Dr. Dyas. She testified that she did not discuss the cause of her knee pain with Dr. Dyas because he was more interested in "trying to get the swelling and pain out of [her] knees." (Tr. 89).

Employer informed Claimant that it could not provide work within her restrictions and terminated her employment on August 18, 2003. She did not receive disability benefits. (Tr. 56).

In December 2003, Dr. Dyas informed Claimant that she needed a total knee replacement, but was too young to undergo such a procedure. He indicated he could only maintain her on medication and assigned a 20% disability to each leg. (Tr. 94).

Claimant sought suitable work with Employer, but did not apply for outside alternative work until she filed an application with Beau Rivage casino in January 2004. (Tr. 91). On March 16, 2004, she began working as a Player's Club Representative, which paid $7.75 per hour and required typing and giving gifts to guests. (Tr. 56, 58-59). She worked 40 hours a week and occasional overtime. (Tr. 59). The Beau Rivage was aware of Claimant's knee restrictions only, which it accommodated by providing a HANDICAP parking pass and allowing her to use the front entrance of the casino. (Tr. 61, 100). The typing and lifting aggravated her hand, shoulder, and neck conditions. She believed she lifted chairs that exceeded her 30-pound lifting restriction and testified that "it started hurting [her] neck and [her] hands." (Tr. 59, 62-63, 96-97).

Claimant did not feel that her employment at the Beau Rivage aggravated her knees. (Tr. 62). The walking and standing required for the job caused pain in her knees, but "it was nothing like the shipyard" and was no worse than the everyday pain caused by walking. (Tr. 98, 109).

Claimant filed a workers' compensation claim in Mississippi against the Beau Rivage for injuries to her neck, hands, and shoulders. (Tr. 62-63, 96-97, 101). She has not worked since August 19, 2004, when Dr. Dyas took her off work. (Tr. 66,

102). The Beau Rivage has not paid any disability benefits nor has it approved any medical treatment. (Tr. 67).

Claimant generally worked five days a week, eight hours each day for Employer, unless she was asked to work overtime. (Tr. 83). At the time her employment ceased, she earned $16.86 per hour, with time and one-half for overtime. (Tr. 42). Claimant was paid her regular wages for holidays or vacation days. She did not sell back any holidays or vacation days in the year preceding her injury. (Tr. 84-85). During that year, everyone in the yard received an across-the-board payment of $3,000.00 for accepting a contract and avoiding a strike.[4] (Tr. 85-86). The $3,000.00 was taxed. (Tr. 108).

Dr. Dyas would allow her to work with Employer if she "worked on the flat" and within her restrictions. (Tr. 93-94). In January 2005, an MRI showed a torn meniscus in both knees and Dr. Dyas indicated that it would be best to fix the ligament. She underwent left knee surgery on February 17, 2005.[5] (Tr. 105). A right knee surgery was scheduled for June 20, 2005, which Employer denied. (Tr. 64).

In 1999, Claimant injured her back and neck in a car accident. She did not sustain injuries to her arms, legs, or knees. (Tr. 65, 80). She filed a lawsuit in which she alleged that her neck and back problems were related to the car accident. (Tr. 80). In 2002, Claimant had a spider bite behind her left knee that caused swelling. (Tr. 81).

Claimant believes she could return to her previous light duty position with Employer. Employer has not offered any employment at restricted duty. (Tr. 67).

The Medical Evidence

Dr. Edmund C. Dyas, IV

Dr. Dyas, a board-certified orthopedic surgeon, was deposed by the parties on June 15, 2005. (EX-22, p. 6). On August 14, 1984, Claimant reported injuring her knee while working for Employer on April 9, 1984 and Dr. Dyas recommended an arthroscopy, which he performed on September 12, 1984. (CX-1, p. 42).

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[4] Employees received similar payments of $1,000.00 on two occasions during the time Claimant was employed. (Tr. 87).

[5] Claimant testified that she underwent two surgeries to her left knee. (Tr. 63). However, it is noted that her testimony indicates surgeries in 1984, 1994, and 2005.

Claimant saw Dr. Dyas approximately once a month following the arthroscopy and, on March 8, 1985, he released her to return to work. On May 13, 1985, he discharged her from treatment for the job-related injury and assigned a 5% disability of her lower left extremity based on chondromalacia of her knee. (CX-1, pp. 39-40).

On September 22, 1986, Claimant presented with "anterior tenderness with crepitus and grating with patellofemoral manipulation" after falling and striking both knees. (CX-1, p. 38). Dr. Dyas placed her off work until October 13, 1986. (CX-1, p. 37; EX-15, pp. 3-4). On November 5, 1986, Claimant continued to complain of bilateral knee pain; Dr. Dyas recommended that she change her job and avoid crawling, stooping, squatting, or getting into close spaces. (CX-1, p. 37; EX-15, p. 5). On January 28, 1987, Dr. Dyas indicated she could not return to her regular job, but could perform lighter work if available. (CX-1, p. 36). On February 26, 1987, he placed her on a leave of absence and continued to recommend that she find a different job in April, May, and June 1987. (CX-1, pp. 34-35).

On May 6, 1988, Dr. Dyas indicated Claimant could be released upon finding employment as a secretary. (CX-1, pp. 31-32). On August 29, 1988, he opined Claimant's knee was "about stabilized." He discharged her from his care on January 25, 1989, with a 10% disability to her body as a whole, related to chondromalacia in both knees.[6] (CX-1, p. 30). On December 26, 1989, Dr. Dyas agreed to allow Claimant to attempt to return to work as an insulator. (CX-1, p. 29).

On June 23, 1992, Claimant presented with complaints of bilateral carpal tunnel symptoms and chronic neck pain. (CX-1, p. 28). Dr. Dyas released her to return to work on June 29, 1992, and he performed a right carpal tunnel release on October 7, 1992. (EX-15, pp. 30-31).

Claimant continued to treat with Dr. Dyas for her carpal tunnel symptoms in November and December 1992. On January 22, 1993, Dr. Dyas diagnosed degenerative cervical disc disease. (CX-1, p. 25). On June 11, 1993, Claimant underwent a left

[6] At his deposition, Dr. Dyas opined Claimant had a 5% to 7% disability to each leg. (EX-22, p. 13). On February 27, 1989, a handwritten notation in Dr. Dyas's medical notes assigned a 20% disability to the left knee, a 10% disability to the right knee, and a 10% disability to Claimant's body as a whole. (CX-1, p. 29).

carpal tunnel release and presented with improvement in July and August 1993. (CX-1, pp. 20-21, 46). On October 6, 1993, Claimant reported pain in her left hand; Dr. Dyas released her to return to work, noting she would not likely be able to perform heavy work due to her cervical disc. (CX-1, p. 20).

On March 11, 1994, Claimant expressed a desire to return to work and Dr. Dyas suggested she perform light duty.[7] On April 6, 1994, he provided a letter stating that she could return to work on April 11, 1994, with restrictions of light duty and no lifting over 20 to 25 pounds. (CX-1, p. 18; EX-15, pp. 52-53). On May 16, 1994, Claimant returned with continuing pain in her neck and both hands.[8] Dr. Dyas opined she reached maximum medical improvement; he assigned a 10% disability of her body as a whole related to her cervical disc and a 10% disability to each upper extremity related to her carpal tunnel.[9] (CX-1, p. 17).

On July 29, 1996, Claimant reported injuring both knees while working in February 1996. X-rays revealed changes in her "patello-femoral joint" and Dr. Dyas placed her on a "light job" with no climbing. (CX-1, p. 15).

On April 24, 1998, Claimant complained of pain and soreness in her right knee and Dr. Dyas diagnosed osteoarthritis. On March 19, 2002, Dr. Dyas diagnosed tendonitis in her right hand and right knee. (CX-1, p. 13). On April 11, 2003, x-rays showed progressive arthritis in her knee. He took her off work until April 21, 2003.[10] (CX-1, p. 13; EX-15, pp. 84-85).

On August 14, 2003, Dr. Dyas opined Claimant "is a danger to herself and her fellow employees if she continues to try to climb, stoop, squat, or strain."[11] (CX-1, p. 12; CX-2, p. 3). He did not note a report of a new injury. (EX-22, p. 20). On

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[7] It is unclear whether Claimant was taken off work after October 6, 1993.

[8] On April 26, 1994, Claimant presented with complaints of pain in her left hand, which Dr. Dyas opined was "tendinitis over the dorsal aspect of her hand." He took Claimant off work for one or two days. (CX-1, p. 17). She also presented with complaints of hand or wrist pain on July 20, 1994, April 7, 1997, March 19, 2002, February 11, 2004, May 20, 2004, October 18, 2004, and November 8, 2004. (CX-1, pp. 4, 6, 9, 11, 13, 15-16).

[9] Claimant continued to present with complaints of neck pain on July 20, 1994, on February 27, 1995, August 19, 2004, and October 4, 2004. (CX-1, pp. 7-8, 16).

[10] Dr. Dyas signed a work release that released Claimant to "full" duty on April 21, 2003. (EX-15, p. 84).

[11] In letters dated August 14, 2003 and October 7, 2003, Dr. Dyas reiterates that Claimant cannot climb aboard a ship, stooping, squatting, or strain her knees excessively. (CX-2, pp. 2-3).

September 19, 2003, Claimant remained "off work because of her knees." Dr. Dyas believed she could return to working in the shop, but recommended that she not work on a ship. He indicated her "patellofemoral crepitus and osteoarthritis" was progressing in both knees. (CX-1, p. 10).

On December 1, 2003, Dr. Dyas found advancing osteoarthritis in both knees and indicated he would have to rate her disability at some point. (CX-1, p. 10). On December 29, 2003, he opined that Claimant's work in the shipyard damaged her knees and noted that "[t]here is not much to do." On February 11, 2004, he specifically stated Claimant was unable to return to work in the shipyard and assigned a 10% disability to her body as a whole, which he related to chondromalacia of her knees. He also diagnosed "DeQuervain's tendonitis" in her right wrist. (CX-1, p. 11). On May 20, 2004, he rated Claimant's disability as "20% of each leg which will be a 10% disability of the body as a whole." (CX-2, p. 1). He also recommended a release of "DeQuervains" in her right wrist, which had bothered Claimant since she worked for Employer. (EX-17, p. 7).

On August 19, 2004, x-rays showed that "both patellas and lateral facet joints" were worn out and Dr. Dyas found crepitation and grating on physical examination. (CX-1, p. 8). According to a medical assessment dated August 19, 2004, Claimant's lifting/carrying capacity was affected by her condition. The assessment limited her standing/walking to one hour without interruption and indicated she could never climb, stoop, or kneel. (CX-2, pp. 1-2). Her impairment affected the following functions: reaching, handling, feeling, and pushing/pulling. Dr. Dyas placed environmental restrictions on Claimant and stated that she had "no endurance for any prolonged activity." (CX-1, p. 2). He opined Employer should expect more than three work absences each month. (CX-3, p. 5).

Dr. Dyas performed "Supartz" injections on September 20, 2004, September 27, 2004, October 4, 2004, October 11, 2004, and October 18, 2004. (CX-1, pp. 6-7). On September 27, 2004, he signed a work status form stating Claimant could not work until she was "rechecked." (EX-17, p. 13). On November 24, 2004, a "sedentary requirements checklist" indicated Claimant could not use both hands in fine manipulation and could not be expected to attend any employment on an eight hour a day/five days per week basis. It further indicated Claimant could perform the following activities: repetitive lifting of five pounds, lifting and carrying ten pounds, sitting for up to six hours in a normal

position, standing for up to two hours in an eight hour work day, and walking short distances. (CX-3, p. 6).

In a letter dated January 11, 2005, Dr. Dyas stated Claimant first sought treatment for carpal tunnel and DeQuervain's disease in the early 1990s and again in early 2004. He opined that her employment at the Beau Rivage in 2004 aggravated the conditions. (CX-1, p. 2).

On January 18, 2005, MRIs of Claimant's knees showed a tear in each lateral meniscus. Dr. Dyas performed a left knee arthroscopy on February 17, 2005. (CX-1, p. 3; EX-22, p. 54). He opined Claimant could perform sedentary work following the surgery. (EX-22, p. 54). At his deposition, he agreed that the findings of the January 2005 MRI were a reflection of the cumulative effect of all knee injuries and aggravations up to that point. (EX-22, p. 59).

At his deposition, Dr. Dyas agreed that Claimant's knee problems after July 25, 2003, were a continuation of her pre-existing knee injury dating to February 20, 1996. He also opined that the 1996 injury "does not give her all of this disease but it aggravated her disease." (EX-22, pp. 22-23). He disagreed with the statement that Claimant's return to work on the ship could have increased her symptoms but not permanently exacerbate her condition and he stated that her return to work on the ship aggravated her knees. (EX-22, p. 25).

With regard to maximum medical improvement, Dr. Dyas testified that, in the absence of the assignment of a specific date, Claimant was "as good as she's going to get in December of '03." The disability rating of 20% to each leg encompassed the impairment rating he previously assigned to Claimant's legs. (EX-22, p. 29). He agreed that Claimant was at maximum medical improvement in December 2003. (EX-22, p. 50).

Although he agreed that standing and walking for three hours each day at the Beau Rivage would aggravate Claimant's underlying knee condition, Dr. Dyas did not have any basis to change her impairment rating. (EX-22, pp. 34, 37). He testified her condition is the result of "twenty years of walking around and getting hurt on that steel down there." He specifically testified that there was not another injury during her employment at the Beau Rivage; rather, he indicated that the walking caused pain which he characterized as "an aggravation." (EX-22, pp. 38-39).

Dr. Dyas recommended an arthroscopy on Claimant's right knee and agreed that she probably has not reached maximum medical improvement as far as her knees are concerned. However, he also testified that he is not going to "re-rate her down the line, even though her knees are going to get worse and worse as she lives." (EX-22, p. 41).

Dr. Dyas agreed that the degenerative process in Claimant's knees was aggravated and precipitated by her injuries with Employer. (EX-22, p. 45).

Ingalls's Infirmary

On March 4, 1996, Claimant presented with pain in both knees after a cable "flipped over striking both knees" on February 20, 1996. Both patellae were tender on physical examination, but no definite crepitus was found. The following restrictions were placed on her activities: no crawling, no working on her knees, and minimal climbing. (EX-3, p. 3).

On March 8, 1996, Claimant again reported pain in both knees and remained off work for the remainder of the day. (EX-2, p. 3). On March 11, 1996, the physician released Claimant to return to work with restrictions of no climbing, no crawling, and no working on her knees. On July 9, 1996, the physician felt Claimant wanted a permanent restriction of no climbing.[12] (EX-2, p. 4). An "Ingalls Return to Work Program" form dated January 24, 1997, identified a permanent work restriction of no climbing. (EX-2, p. 9).

On July 29, 2003, Claimant complained of a knee strain and the physician noted she was on permanent restrictions for both knees. Claimant could not identify a specific injury, but indicated she had been climbing and "working on her knees." On August 18, 2003, she returned with a letter recommending work restrictions. (EX-16, p. 1). A form dated August 18, 2003, identified permanent work restrictions of no climbing aboard ships and not stooping/squatting. It further indicated Employer could not provide work within the restrictions. (EX-16, p. 2).

Pre-Injury Medical Records[13]

On September 4, 1986, Claimant presented with complaints of pain and swelling in both knees after falling in the morning. Claimant was taken off work for the day and again presented with

[12] Significant portions of the handwritten record dated June 27, 1996, are illegible. (EX-3, p. 2).

[13] The record does not contain the credentials of the doctors identified in the following medical reports.

complaints of pain and soreness on September 9, 1986, September 16, 1986, and January 5, 1987.[14] On January 8, 1987, she was "pulled per Dr. Dyas." (EX-15, pp. 1-2).

In a report dated January 24, 1989, Dr. Daniel Enger indicated that he diagnosed "early chondromalacia of the patella" after examining Claimant on June 18, 1984, in connection with a May 9, 1984 left knee injury. At the time of his 1989 examination of Claimant, she reported pain in both knees, occasional swelling, and giving way in her left knee. A review of "merchant views of the patella" showed an "intercondylar notch" in both knees. He again diagnosed mild chondromalacia of the patella and opined that it is aggravated by climbing at work. He opined she had reached maximum medical improvement; he agreed with a 5% permanent partial disability to her left leg, but would not assign a disability to her right leg. (EX-15, pp. 18-21). On November 22, 1989, Dr. Enger agreed that Claimant could work as an insulator, but cautioned that such work would increase the development of arthritic changes in her left knee over time. He felt she would have no problem returning to work "on the flat."[15] (EX-15, pp. 24-25).

On March 15, 1993, Dr. Fritz A. LaCour, Jr., examined Claimant and noted she had been off work since May 29, 1992. Claimant presented with complaints of stiffness and pain in her neck, with occasional pain radiating down her arms and legs. He noted her MRI revealed a central herniation at the C3-4 and C7-T1 levels, but found "no evidence to support that her MRI scan is relevant clinically based on the combination of history and physical findings." He noted there were no objective findings. (EX-15, pp. 39-40).

Dr. Brent A. Faircloth provided reports dated March 23, 1993, April 6, 1993, April 27, 1993, and September 7, 1993. Claimant presented a history of neck and right arm pain beginning on May 29, 1992. He indicated that the MRI revealed a "small central herniation at C3-4 and broadbased bulging disc at C7-T1." (EX-15, pp. 41-43). On April 27, 1993, he opined Claimant could return to light duty "from her neck standpoint" with temporary restrictions of no lifting greater than 20 to 30

[14] The handwritten medical notes do not designate a physician or hospital. The notes include a referral to Dr. Warfield of the Ingalls's Infirmary. According to handwritten note dated June 1, 1992, Claimant complained of neck pain and numbness in her right arm; physical exam revealed limited range of motion in her arm and pain with neck rotation. (EX-15, p. 26).

[15] In a handwritten note dated January 17, 1990, a physician agreed with the recommendation that Claimant "should work on the flat."

pounds and no prolonged sitting/standing. He released Claimant to Dr. Dyas's care. (EX-15, pp. 44-45).

On October 15, 1993, Dr. William A. Crotwell, III, examined Claimant at Employer's request. Claimant was not working and complained of bilateral hand pain with loss of grip and muscle strength in both hands. He diagnosed "bilateral carpal tunnel syndrome, status post-surgical release, with mild residual scar sensitivity on the left." He opined Claimant reached maximum medical improvement for the carpal tunnel syndrome and assigned the following impairment ratings: (1) a "2% permanent physical impairment and loss of physical function to the right hand, which relates to 2% impairment to the right upper extremity, which relates to 1% impairment to the person as a whole," and (2) a "5% permanent physical impairment to the left hand, which relates to 5% impairment to the left upper extremity, which relates to 3% impairment to the person as a whole." Based on the carpal tunnel syndrome, he recommended Claimant perform medium to light duty work and limited her lifting to no more than 30 to 40 pounds infrequently and 20 to 25 pounds frequently. (EX-15, pp. 49-50).

On March 18, 1997, and June 9, 1997, Dr. Gary M. Rodberg examined Claimant, who reported experiencing intermittent shortness of breath over the preceding 15 years. Dr. Rodberg opined that "spirimetry" was most consistent with obstructive lung disease and diagnosed "moderated COPD and mild restrictive lung disease." He related Claimant's condition to passive smoke exposure and occupationally related airborne pollutant exposure.[16] (EX-15, pp. 66-67, 76-77).

The Vocational Evidence

On November 24, 2003, Tommy Sanders generated a "Preliminary Vocational Assessment/Labor Market Survey" regarding Claimant. Mr. Sanders reviewed Claimant's employment application, as well as the medical reports of Dr. Dyas. He considered Claimant's age, education, and work experience. (EX-19, p. 1). Mr. Sanders indicated that her work activity as an insulator required medium physical activity and was a semi-skilled position that did not allow the development of any significant transferable skills. He noted Claimant's physical abilities allowed performance of sedentary and light activities, as well as some levels of medium activity with avoidance of

[16] On January 10, 1998, Claimant presented to the Ocean Springs Hospital emergency room with shortness of breath after being exposed to galvanized welding fumes. The "emergency department report" diagnosed chronic obstructive pulmonary disease and shortness of breath. (EX-15, pp. 78-79).

frequent climbing, stooping, squatting, and straining of her knees. (EX-19, p. 2).

Mr. Sanders conducted a labor market survey and identified three potential employment opportunities:

> (1) a full-time cashier at Smokey's Discount Tobacco in Pascagoula, Mississippi. The duties included operating a cash register, cleaning, and stocking coolers and cigarette shelves. The position required occasional lifting of 25 pounds and occasional bending, stooping, and squatting. The position also required frequent sitting, walking, and handling. The job paid $5.15 per hour. (EX-19, p. 2).
>
> (2) a full-time "hospital environmental services aide" with Singing River Hospital Systems in Ocean Springs, Mississippi. The duties included cleaning patients' rooms, offices, and other areas of the hospital. The job required the ability to follow oral and written instructions. The job further required frequent to constant standing/walking, occasional lifting of 10 pounds, pushing a cleaning cart, and occasional bending, stooping, or squatting. The position paid $6.49 per hour. (EX-19, p. 2).
>
> (3) a full-time or part-time cashier at Clarke Oil in Gautier, Mississippi. The duties included greeting customers and operating a cash register and credit card machine, as well as sweeping and mopping the store. The employee would also stock shelves and complete a shift report. The job required occasional lifting up to 30 pounds, bending and stooping to retrieve items from lower shelves, frequent standing and walking, and occasional sitting. The position paid $6.00 per hour and was available as full-time or part-time with 16 to 40 hours per week. (EX-19, pp. 2-3).

With regard to available jobs on or about August 15, 2003,[17] Mr. Sanders determined Munro Petroleum was hiring convenience store cashiers for shifts of 34-38 hours per week. The job paid $6.00 per hour. Additionally, Pinkerton Security hired full-time and part-time security guards and paid $5.50 per hour or greater depending upon assignment. Singing River Hospital was hiring a full-time food server and paid $6.50 per hour. (EX-19, p. 3).

[17] Mr. Sanders indicated that Employer requested that he identify jobs available on or about August 15, 2003. (EX-19, p. 3).

The Contentions of the Parties

Claimant contends she sustained an injury to both knees on or about July 25, 2003, which caused an aggravation of her pre-existing disability. She contends that she did not sustain a new injury to her knees while working for the Beau Rivage casino and further contends Employer is not relieved of liability for benefits and medical expenses arising from aggravation of her carpal tunnel and DeQuervain's disease while working for the Beau Rivage. She further contends she is entitled to continuing medical care for her knees and for all conditions that were caused by or related to her job injuries and working conditions with Employer. Claimant requests temporary partial disability benefits from August 18, 2003 to August 19, 2004 and temporary total disability benefits from August 20, 2004 to present and continuing. She argues that she is entitled to compensation at a rate of $543.86 per week, based on an average weekly wage of $815.80. Alternatively, she contends that vacation days should be included in the calculation of her average weekly wage, resulting in an average weekly wage of $780.00 and a compensation rate of $520.00.

Employer contends Claimant failed to prove a compensable injury on July 25, 2003, and contends Claimant's continuing disability and continued medical treatment is unrelated to the alleged July 25, 2003 incident. In the alternative, Employer contends that, if Claimant sustained an injury on July 25, 2003, Claimant was temporarily partially disabled until she reached maximum medical improvement on December 1, 2003. It contends suitable alternative employment existed from the date Claimant left Employer through the date of maximum medical improvement. Employer contends any disability thereafter should be limited to a 20% scheduled award to each leg. Employer argues it is not responsible for any worsening in Claimant's condition following her employment at the Beau Rivage, arguing her employment at the Beau Rivage was an independent intervening cause.

Employer asserts the $3,000.00 payment received by Claimant from Employer should not be included in the calculation of her average weekly wage. Employer contends penalties are not applicable because it timely controverted the instant claim.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377

F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981),

aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

Claimant contends she has established a **prima facie** case of liability. She argues that her job duties in July 2003 caused, aggravated, and/or contributed to her disability and need for additional medical treatment.

Employer contends Claimant's complaints on July 25, 2003, were nothing more than a manifestation of her pre-existing knee condition which was already symptomatic. Employer points not only to the pre-existing knee problems, but also points to Claimant's allegation of an unwitnessed knee injury, her failure to report a "re-injury" to her supervisor or treating physician, and the fact that she had learned the statute of limitations had expired on a claim for her 1996 knee injuries. Employer contends Claimant has not established the fact of injury with regard to her knee and further contends she failed to establish the fact of injury to any other part of her body.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. Preziosi v. Controlled Indus., 22 BRBS 468 (1989); Janusziewicz v. Sun Shipbuilding and Dry Dock Co., 22 BRBS 376(1989)(Decision and Order on Remand); Johnson v. Ingalls Shipbuilding Div. Litton Sys., 22 BRBS 160(1989); Madrid v. Coast Marine Constr. Co., 22 BRBS 148(1989); Gardner v. Bath Iron Works Corp., 11 BRBS 556 (1979), aff'd sub nom. Gardner v. Director, OWCP, 640 F.2d 1385(1st Cir. 1981).

In the present matter, Claimant testified that Employer placed her "on the ship" on June 30, 2003, and that her duties thereafter included activities that did not comport with her restrictions. Claimant testified that her work activities on July 25, 2003, required her to climb ladders and that she could

barely walk by 12:00 p.m. She informed her supervisor that she was in pain and was sent home for the day. Although she did not identify a specific injury occurring on July 25, 2003, Claimant informed the physicians at Employer's infirmary that she had been climbing and working on her knees. Shortly thereafter, on August 14, 2003 and September 19, 2003, Claimant saw Dr. Dyas, who took Claimant off work and opined that the "patellofemoral crepitus and osteoarthritis" had progressed in both knees. He testified that Claimant's return to work on the ship aggravated her knee condition.

I find Claimant's credible complaints of pain occurring on July 25, 2003, along with Dr. Dyas's opinions regarding progression and aggravation of her knee conditions, are sufficient to establish aggravation of a pre-existing injury. Based on Claimant's credible testimony regarding her work activities, I further find and conclude she established that working conditions and activities on that date could have caused the aggravation of her pre-existing condition. Accordingly, I find and conclude Claimant has set forth a **prima facie** case that she sustained an injury on July 25, 2003, and that work conditions existed that could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by her working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less

demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984). Highly equivocal evidence is not substantial and will not rebut the presumption. Dewberry v. Southern Stevedoring Corp., 7 BRBS 322 (1977), aff'd mem., 590 F.2d 331, 9 BRBS 436 (4th Cir. 1978).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Employer contends Claimant's condition after July 25, 2003, is due to the natural and unavoidable result of her pre-existing knee injuries. In support of its contention, Employer notes that Claimant's pre-existing knee injuries were already symptomatic and that she did not mention a July 2003 knee injury to Dr. Dyas. Employer also points to Dr. Dyas's testimony that Claimant's problems after July 25, 2003, were probably a continuation of her pre-existing 1996 knee injury. Because he

did not note a specific injury in July 2003, Dr. Dyas agreed that Claimant's condition after July 25, 2003, was "a continuum of the progression of the disease." He further agreed that her increasing pain from activities would have subsided and she would have returned to a "baseline level due to deterioration of her underlying osteoarthritis."

Despite Dr. Dyas's indication that Claimant's knee injuries were the progression of her pre-existing injuries or an underlying condition, he clearly testified that Claimant's return to work on the ship aggravated her knees and disagreed with the contention that such work could increase her symptoms without resulting in a permanent exacerbation of her condition. His medical notes indicated that Claimant's work at the shipyard aggravated her knees and suggested that her return to the ship in July 2003 aggravated her symptoms.

The isolated portion of Dr. Dyas's testimony cited by Employer may be sufficient to rebut the Section 20(a) presumption by suggesting that Claimant's knee condition on and after July 25, 2003, was the natural and unavoidable result of her pre-existing injuries and underlying condition. However, when Dr. Dyas's testimony is considered as a whole, along with his medical notes, his opinion favors a finding of causation. At the very least, I find his opinion is equivocal as to whether Claimant's knee injuries resulted from an aggravation or a natural progression. Accordingly, I find and conclude Employer has not presented substantial evidence to rebut the Section 20(a) presumption with regard to Claimant's knee injuries.[18]

B. Intervening Cause

Employer contends that any worsening in Claimant's knee condition is due to an aggravation of the condition caused by walking and standing three hours each day while working at the Beau Rivage casino. Claimant contends she did not sustain new knee injuries while employed with the Beau Rivage.

[18] Even assuming **arguendo** that Dr. Dyas's opinion was sufficient to rebut the presumption, the undersigned would find causation after weighing the record evidence. Dr. Dyas offered the only medical opinion of record concerning Claimant's knee injuries on and after July 25, 2003. As previously discussed, when his testimony is considered as a whole and in conjunction with his medical records, the evidence does not weigh in favor of finding that Claimant's knee injuries simply resulted from the natural and unavoidable progression of prior injuries; rather, the record supports a finding and conclusion that Claimant's work activities aboard ship on July 25, 2003, aggravated her knee conditions.

If there has been **a subsequent non-work-related injury** or aggravation, the Employer is liable for the entire disability **if** the second injury is the natural or unavoidable result of the first injury. Atlantic Marine v. Bruce, supra; Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954)(if an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986).

If, however, the subsequent injury or aggravation is not a natural or unavoidable result of the work injury, but is the result of an intervening cause such as the employee's intentional or negligent conduct, the employer is relieved of liability attributable to the subsequent injury. Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT)(5th Cir. 1983); Colburn v. General Dynamics Corp., 21 BRBS 219, 222 (1988).

Where there is no evidence of record which apportions the disability between the two injuries it is appropriate to hold employer liable for benefits for the entire disability. Plappert v. Marine Corps Exchange, 31 BRBS 13, 15 (1997), aff'd 31 BRBS 109 (en banc); Bass v. Broadway Maintenance, 28 BRBS 11, 15-16 (1994).

Moreover, if there has been a subsequent non-work-related event, an employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that Claimant's condition was caused by the subsequent non-work-related event; in such a case, employer must additionally establish that the first work-related injury did not cause the second accident. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989).

The U.S. Fifth Circuit Court of Appeals has set forth "somewhat different standards" regarding establishment of supervening events. Shell Offshore, Inc. v. Director, OWCP, 122 F.3d 312, 31 BRBS 129 (CRT)(5th Cir. 1997). The initial standard was set forth in Voris v. Texas Employers Ins. Ass'n., which held that a supervening cause was an influence originating entirely outside of employment that overpowered and nullified the initial injury. 190 F.2d 929, 934 (5th Cir. 1951). Later, the Court in Mississippi Coast Marine v. Bosarge, held that a simple "worsening" could give rise to a supervening cause. 637 F.2d 994, 1000 (5th Cir. 1981). Specifically, the Court held that "[a] subsequent injury is compensable if it is the direct and natural result of a compensable primary injury, as long as

the subsequent progression of the condition is not shown to have been worsened by an independent cause."

Similarly, the basic rule of law in "**direct and natural consequences**" cases is stated in 1 A. Larson Workmen's Compensation Law, §13.00 at 3-502 (1992):

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, **unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct.**" (Emphasis added).

Thus, the subsequent progression of that condition remains compensable, as long as the worsening is not shown to have been produced by an independent or non-industrial cause or exertion that in itself would not be reasonable in the circumstances.

I find and conclude Employer has not established that any worsening of Claimant's knee condition resulted from an intervening cause or unreasonable exertion, rather than from the natural progression of her work-related knee injury. While it is noted that Claimant was required to stand for three hours while working at the Beau Rivage, walking and standing are activities that occur on a daily basis, are arguably unavoidable, and not included in Dr. Dyas's restricted activities. Further, Dr. Dyas testified that Claimant's twenty-year career with Employer "put her in the position where she was before she started working at the Beau Rivage." Although he testified that her walking and standing activities would aggravate her knees and cause pain, he stated that it did not aggravate her knees to the extent that he would increase her impairment rating. (EX-22, p. 37). Based on the foregoing, I find and conclude the record does not support a conclusion that Claimant's activities at the Beau Rivage worsened or overpowered and nullified her job injury.

Moreover, Employer has not presented any evidence that Claimant engaged in intentional or negligent conduct sufficient to constitute an intervening cause. Employer also has not identified a specific accident or injury that could have aggravated Claimant's condition and Dr. Dyas testified that she

did not sustain another injury at the Beau Rivage.[19] In the absence of evidence of a second injury or intentional or negligent conduct or unreasonable exertion, I find and conclude that the record does not support a conclusion that any worsening of Claimant's knee condition was the result of an intervening cause.

Based on the foregoing, I find and conclude Employer is not relieved of liability for any worsening of Claimant's July 25, 2003 knee injury.

C. The Aggravation or Two-Injury Rule

Claimant contends Employer is liable for Claimant's carpal tunnel syndrome in both hands and her DeQuervain's disease, arguing that "later exposure or aggravation in employment not covered by the LHWCA does not relieve the last longshore employer of liability." Claimant relies on Todd Shipyards Corp. v. Black, 717 F.2d 1280 (9th Cir. 1983), as support her position.

The aggravation or two-injury rule is:

> If the disability resulted from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable and accordingly, the prior employer is responsible. If, on the other hand, the subsequent injury aggravated, accelerated or combined with the claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is responsible.

Strachan Shipping Co. v. Nash, 782 F.2d 513 (5th Cir. 1986)(en banc), aff'g 751 F.2d 1460 (5th Cir. 1985), aff'g 15 BRBS 386 (1983).

In his letter dated January 11, 2005, Dr. Dyas unequivocally opined that Claimant's work activities at the Beau Rivage, namely typing all day, aggravated her pre-existing

[19] He testified that there was "an aggravation . . .[t]here's not another injury at the Beau Rivage." (EX-22, p. 39).

carpal tunnel and DeQuervain's disease.[20] I find his opinion is supported by his deposition testimony and his medical records, which indicate that Claimant initially presented with carpal tunnel and DeQuervain's symptoms in the early 1990s and was not again treated for the conditions until early 2004. In 1997, Dr. Dyas noted "bilateral recurrent carpal tunnel," but he thereafter identified complaints of hand pain only on one occasion in a medical note dated March 19, 2002. Dr. Dyas did not again note complaints of hand or wrist pain until February 2004, which was nearly two years after her last complaint and approximately six months after her employment was terminated. Moreover, Claimant's complaints of hand/wrist pain notably increased and became more consistent following the onset of her employment with the Beau Rivage in March 2004.

Based on the foregoing, I find and conclude Claimant's carpal tunnel and DeQuervain's disease were aggravated by her employment with the Beau Rivage and her current condition was not caused merely from the natural progression of a prior work-related injury.

I further find Claimant improperly relies on Todd Shipyards Corp. v. Black, to support its contention that Employer is nonetheless responsible for Claimant's injuries because the Beau Rivage is not an employer covered by the Act. Aggravation of a covered injury (as distinguished from disease) caused by a later injury which occurs after termination of covered longshore employment is not compensable under the Act. Leach v. Thompson's Dairy, Inc., 13 BRBS 231 (1981). See also Brown v. Bath Iron Works Corp., 22 BRBS 384, 388 (1989). I find Black distinguishable from the present case because it concerned an occupational disease, rather than a successive injury or aggravation. Accordingly, I find and conclude Employer is not liable for Claimant's current carpal tunnel and DeQuervain's disease.

D. Nature and Extent of Disability

Having found that Claimant suffers from compensable knee injuries, the burden of proving the nature and extent of her

[20] Claimant first presented with carpal tunnel symptoms in 1992. She testified that she filed a claim for her neck condition and carpal tunnel, which was settled. It is unclear whether the settlement released Employer from future liability for Claimant's neck and carpal tunnel injuries since neither party submitted documentation of the settlement into the record.

disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and her inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if she has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that she is unable to return to her regular or usual employment due to her work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance

Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of her usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing her usual employment, she suffers no loss of wage earning capacity and is no longer disabled under the Act.

E. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). If a physician does not specify the date of maximum medical improvement, however, a judge may use the date the physician rated the extent of the injured worker's permanent impairment. See Jones v. Genco, Inc., 21 BRBS 12, 15 (1988).

An employee reaches maximum medical improvement when her condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981). A temporary deterioration of a permanently disabled worker does not render her temporarily disabled. Leech v. Service Engineering Co., 15 BRBS 18 (1982)(Held, a temporary total disability award subsumed the permanent partial award for the same injury, but that the underlying permanent partial disability did not disappear during the temporary exacerbation).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Dr. Dyas provided the only medical opinion of record regarding MMI. While he assigned disability ratings prior to December 2003, his December 1, 2003 office note indicated Claimant had a "greater disability than before." Accordingly, I find the prior disability ratings do not establish an MMI date

for the July 25, 2003 knee injuries. On December 29, 2003, Dr. Dyas indicated that there was "not much to do." Although he did not assign new disability ratings until February and May 2004, Dr. Dyas testified that Claimant was "as good as she's going to get in December of '03" and agreed that she reached MMI in December 2003.

Nonetheless, at his deposition, Dr. Dyas agreed that Claimant's knees probably had not reached MMI because she underwent a left knee arthroscopy on February 17, 2005, and because surgery had been recommended on her left knee. The underlying permanent disability is not altered during a period of temporary disability covered by subsequent related surgery and convalescent care. See Carlisle v. Bunge Corporation, 33 BRBS 133 (1999); Delay v. Jones Washington Stevedoring Company, 31 BRBS 197, 200-201 (1998); Leech v. Service Engineering Co., supra. Therefore, it is axiomatic that once a claimant has a permanent impairment/disability her status remains permanent. See Davenport v. Apex Decorating Company, Incorporated, 18 BRBS 194, 196-197 (1986). Accordingly, I find Claimant reached MMI in December 2003.

Based on Dr. Dyas's deposition testimony and the statement that he could not do much more for Claimant, I find and conclude Claimant's knee injuries reached MMI on December 29, 2003.

1. Scheduled Disability Benefits

If the permanent disability is to a member identified in the schedule, as in the instant case, the injured employee is entitled to receive two-thirds of her average weekly wage for a specific number of weeks, regardless of whether her earning capacity has been impaired. See Henry v. George Hyman Construction Co., 749 F.2d 65, 17 BRBS 39 (CRT)(D.C. Cir. 1984).

Section 8(c)(2) of the Act provides an employee with "leg lost" compensation for 288 weeks at a rate of sixty-six and two-thirds percent of the average weekly wage. Section 8(c)(19) of the Act further states that "compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member."

Dr. Dyas assigned a 5% disability rating to Claimant's left leg on May 13, 1985, and Claimant testified that Employer paid for her 5% disability. On May 20, 2004, Dr. Dyas rated Claimant's disability as 20% of each leg, resulting in a 10% disability of her body as a whole. There is no medical evidence

of record to dispute Dr. Dyas's disability rating. Accordingly, I find and conclude Claimant is entitled to a scheduled award of 15% disability to her left leg and to a scheduled award of 20% disability to her right leg. Thus, Employer shall pay to Claimant scheduled disability benefits for 43.2 weeks based on two-thirds of Claimant's average weekly wage of $703.65, as discussed below, for the scheduled injury to her left knee. (15% x 288 weeks = 43.2 weeks). Additionally, Employer shall pay to Claimant scheduled disability benefits for 57.6 weeks based on two-thirds of Claimant's average weekly wage of $703.65, for the scheduled injury to her right knee. (20% x 288 weeks = 57.6 weeks).

2. The Non-Scheduled Benefits

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that she is totally disabled. Potomac Elec. Power Co. v. Director, OWCP, 449 U.S. 268, 277 n.17, 14 BRBS 363 (1980)(herein "PEPCO"); Davenport v. Daytona Marine & Boat Works, 16 BRBS 168, 173 (1984). Unless the worker is totally disabled, however, she is limited to the compensation provided by the appropriate schedule provision. Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168, 172 (1984).

Employer does not dispute that Claimant was unable to continue her job as an insulator due to the assignment of a 20% disability to each leg and the restrictions assigned by Dr. Dyas. Accordingly, I find and conclude Claimant has established a **prima facie** case of total disability due to her compensable knee injuries.

F. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

(1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following her injury, that is, what types of jobs

is he capable of performing or capable of being trained to do?

(2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be

found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

August 18, 2003 to March 15, 2004

The medical reports of record indicate that Claimant's activities had been restricted prior to July 25, 2003, due to earlier knee, neck, and hand injuries. The record evidence does not indicate whether these restrictions were permanent or temporary. Based on Claimant's testimony that she was placed in a permanent light duty position in 1997 and based on Dr. Dyas's continuing recommendations that she seek employment outside of Employer's shipyard, I find that her prior restrictions were permanent. It is noted that several physicians placed restrictions on Claimant's activities before 2003. However, as Dr. Dyas is her treating physician and the only physician with credentials reflected in the record, I accord greater weight to the restrictions assigned by him. Consequently, I find Claimant's activities were limited to light duty, no lifting over 20 to 25 pounds, and no climbing prior to July 25, 2003. On August 14, 2003, Dr. Dyas opined that Claimant would be a danger to herself and others if she continued to "climb aboard a ship, stoop, squat, or strain her knees excessively." He indicated she could work in a job that allowed her to "stand and walk about." Accordingly, I find and conclude suitable alternative employment must comply with the following restrictions in place as of August 14, 2003: light duty work, no lifting over 20 to 25 pounds, no climbing, no climbing aboard a ship, and no stooping, squatting, or excessive strain on her knees.

The labor market survey dated November 24, 2003, identified three job openings available on or about August 15, 2003. However, the labor market survey simply provided the name of each employer, the wages, and the number of hours available for each work week. Because the labor market survey does not

provide the physical requirements of the job openings, I cannot determine whether the jobs complied with Claimant's physical restrictions. Accordingly, I find and conclude Employer has not established the existence of suitable employment available at the time of Claimant's termination in August 2003.

The labor market survey also identified three positions available on or around November 24, 2003. After reviewing the physical requirements of each position, I find and conclude the jobs do not establish suitable alternative employment. The position at Clarke Oil required occasional lifting of 30 pounds, which is greater than the 20 to 25 pound lifting restriction assigned by Dr. Dyas. Further, all three positions required occasional bending, stooping, and squatting. Dr. Dyas did not clarify whether he restricted these activities to an occasional basis or whether Claimant was never to engage in these activities. In the absence of further clarification, I decline to assume that Claimant could occasionally perform bending, stooping, or squatting activities. Accordingly, I find and conclude the three available jobs identified in the labor market survey do not establish suitable alternative employment.

Based on the foregoing, I find and conclude Claimant is entitled to temporary total disability benefits from August 18, 2003 to December 28, 2003, based on her average weekly wage of $703.65. Because Employer did not demonstrate suitable alternative employment after Claimant's condition became permanent on December 29, 2003, I further find and conclude Claimant is entitled to permanent total disability benefits from December 29, 2003 to March 15, 2004, based on her average weekly wage of $703.65.

March 16, 2004 to September 26, 2004

On March 16, 2004, Claimant began working for the Beau Rivage casino. I find and conclude Claimant's job with the Beau Rivage constituted suitable alternative employment.

Despite Claimant's testimony that Dr. Dyas took her off work in August 2004 due to her hand condition, the record does not contain an August 2004 opinion that stated Claimant could not work. A work status form referencing a September 27, 2004 visit is the first clear indication that Claimant was unable to work.[21] (EX-17, p. 13). Because no medical opinion was rendered

[21] The record contains an undated and handwritten note that appears to state that Claimant is unable to work until "9/19." (EX-17, p. 11). Because the note is not dated, I am unable to determine when Claimant was taken off work.

between August 19, 2004 and September 27, 2004, that plainly removed Claimant from all work activities, I find and conclude her employment at the Beau Rivage continued to establish suitable alternative employment until Claimant was taken off work on September 27, 2004.

Based on the foregoing, I find and conclude Claimant was permanently partially disabled from March 16, 2004 to September 27, 2004. Accordingly, I further find and conclude Claimant is entitled to scheduled disability benefits for the approximately 28 weeks during which she was permanently partially disabled based on two-thirds of her average weekly wage of $703.65.[22]

September 27, 2004 to present and continuing

Although Claimant's testimony indicated that she was taken off work for her hand condition, I find Dr. Dyas's medical reports suggest that a combination of her hand and knee injuries rendered her unable to work. Because ongoing knee problems were noted by Dr. Dyas when he took Claimant off work and were subsequently treated, I find Claimant's removal from work on September 27, 2004, was due in part to her compensable work-related knee injuries.

It is noted that Dr. Dyas testified Claimant could perform sedentary work following her February 2005 knee surgery. The labor market survey of record does not identify any sedentary positions. Accordingly, I find and conclude the survey does not establish suitable alternative employment. Further, the labor market survey was generated approximately ten months before Claimant was removed from all work activities and more than one year prior to her February 2005 knee surgery. Assuming **arguendo** that the labor market survey identified suitable sedentary work, I find and conclude that the November 2003 labor market survey would not be sufficient to establish suitable alternative employment in February 2005 in the absence of further evidence that the jobs identified in the survey remained available.

[22] Claimant's "Report of Earnings" approximated that she earned $300.00 per week during her employment with the Beau Rivage. She testified that she earned $7.75 per hour and worked 40 hours each week, with occasional overtime. Accordingly, I find she had a weekly wage earning capacity of $310.00. ($7.75 x 40 hours = $310.00). However, an employee with a scheduled injury under the Act is presumed to be disabled, even though the injury does not actually affect her earnings. Bath Iron Works Corp. v. Director, OWCP, 506 U.S. 153, 26 BRBS 151 (CRT)(1993). As such, no proof of loss of wage-earning capacity is specified in the schedule. Consequently, I find that Claimant's scheduled disability award should not be offset by her earnings with the Beau Rivage, which notably is not a longshore employer.

Based on the foregoing, I find and conclude Employer has not established the existence of suitable alternative employment after September 27, 2004, and Claimant is entitled to permanent total disability benefits from September 28, 2004 through present and continuing, based on her average weekly wage of $703.65.[23]

E. Average Weekly Wage[24]

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average **annual** earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average **weekly** wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, her annual earnings are computed using her actual **daily** wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, her average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to

[23] Claimant's award of benefits moved from a scheduled award to a non-scheduled award when she reached permanent total disability. It is noted, however, that she arguably would be entitled to the remaining approximately 72 weeks of scheduled benefits if and when her disability becomes partial in the future.

[24] Both parties submitted proposed calculations of Claimant's average weekly wage. Claimant proposed two separate calculations based her calculation on yearly earnings of $33,773.86. She arrived at an average weekly wage of $815.80 by dividing her earnings by 207 days worked, excluding vacation days. In the alternative, she arrived at an average weekly wage of $780.00 by dividing her earnings by 216.5 days worked, including vacation days. Employer based its calculation on total earnings of $30,773.86. It requested an average weekly wage of $660.35, based on 233 days worked. While the calculations of both parties have been considered, it is noted that neither party explained how it arrived at the proposed number of days worked.

Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which [he] was working at the time of her injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

Under Section 2(13), wages are defined as:

> . . . the money rate at which the **service rendered by an employee** is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 [26 U.S.C.A. 3101 et seq.](relating to employment taxes). The term wages does not include fringe benefits, including (but not

> limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement. (emphasis added).

The Act dictates that the advantage must be received from the employer. 33 U.S.C. 902(13). The Board further specifies that the advantage received must flow directly or indirectly from the employer to the employee. Lopez v. Southern Stevedores, 23 BRBS 295, 301(1990); Rayner v. Maritime Terminals, 22 BRBS 5, 9 (1988); McMennamy v. Young & Co., 21 BRBS 351, 354 (1988). Further, the advantage must be ascertainable and readily calculable. Morrison-Knudsen Constr. Co. v. Director, OWCP, 461 U.S. 624, 632, 15 BRBS 155, 157 (CRT)(1983); McMennamy, 21 BRBS at 353; Denton v. Northrop Corp., 21 BRBS 37, 47 (1988); Thompson v. McDonnell Douglas Corp., 17 BRBS 6, 8 (1984).

Any advantage that an employee receives from an employer, that does not fit the statutory definition of wages, must be characterized as a "**fringe benefit**" to be excluded from the statutory definition. McMennamy, 21 BRBS at 354. For the most part, "fringe benefits" are not "easily convertible into cash or are speculative," or are not "readily calculable." See Morrison-Knudsen, supra. See also McMennamy, 21 BRBS at 353; Denton, 21 BRBS at 46; Thompson, supra.

In the present matter, the parties submitted statements of Claimant's earnings with Employer from July 22, 2002 to July 20, 2003. Based on the earnings statements, I find and conclude Section 10(a) of the Act is the appropriate standard under which to calculate average weekly wage in this matter, as Claimant worked "substantially the whole of the year" preceding her July 25, 2003 injury.

In Ingalls Shipbuilding, Inc. v. Wooley, 204 F.3d 616 (5th Cir. 2000), the claimant's daily work records contained work entries on 256 different days in the year preceding the injury, which included four entries for vacation compensation. The parties did not dispute that the claimant was paid for a total of 120 vacation hours, but the ALJ counted the four entries of vacation pay as four days. The employer contended the vacation pay should have been counted as 15 eight-hour days. The Fifth Circuit declined to create a bright-line rule concerning treatment of vacation compensation under subsection 10(c) of the

Act, and charged the ALJ with "making fact findings concerning whether a particular instance of vacation compensation counts as a 'day worked' or whether it was 'sold back' to the employer for additional pay." Id. at 618. With respect to the facts presented in Wooley, the Fifth Circuit affirmed the ALJ's conclusion that the claimant took four vacation days and "sold back" 11 eight-hour days that were not treated as days worked, but were considered "additional compensation to be added to [the claimant's] annual wage." Id.

Claimant submitted daily wage records from July 22, 2002 through July 20, 2003. (CX-4). The records reflect that Claimant worked 1,653.1 hours and received vacation pay for 178.0 hours during the year preceding her injury, earning $30,773.86, plus a $3,000.00 "contract bonus."[25] (CX-5, p. 1). The daily wage records identify 198 different dates on which Claimant earned wages for "regular" hours. In addition, the daily wage records contain 15 entries reflecting vacation hours.[26]

Of the 15 entries reflecting vacation hours, entries dated August 4, 2002, September 29, 2002, January 5, 2003, and January 26, 2003, each show that Claimant was paid for 16.0 hours of vacation. Claimant's daily wage records show that she missed two days of work in either the week immediately preceding or immediately following each entry; consequently, I find the four entries reflect vacation days, rather than days "sold back." Accordingly, I find and conclude these four entries constitute a total of eight eight-hour vacation days which should be treated as days worked. Similarly, I find that the one entry dated July 13, 2003, which identifies 40 hours of vacation time constitutes five eight-hour vacation days which should be treated as days worked[27] and the six entries that each reflect 8.0 hours of

[25] Claimant testified that she did not sell back any vacation time in the year prior to her injury. I find her testimony is supported by the daily wage records, which reflect use of vacation hours during work weeks in which Claimant did not work five days. Accordingly, I find and conclude the vacation hours should be considered "days worked." Ingalls Shipbuilding, Inc. v. Wooley, 204 F.3d 616 (5th Cir. 2000).

[26] In Diosdado v. Newpark Shipbuilding & Repair, Inc., 31 BRBS 70 (1997), the Board affirmed the ALJ's determination of the number of days worked where the ALJ divided the total number of hours worked by 8 hours per day. In the present case, however, the record contains daily entries of Claimant's earnings which I find more accurately depict the number of days worked.

[27] According to the daily wage records, Claimant did not work the entire week prior to the July 13, 2003 entry. Without further explanation from either party, I find the single 40.0 hour entry reflects one week of paid vacation.

vacation pay constitute a total of six eight-hour days that should also be treated as days worked.[28]

The wage records contain three entries dated October 27, 2002, November 3, 2002, and December 1, 2002, which each show that Claimant was paid four vacation hours. The daily wage records show that Claimant worked a four-hour day in the week immediately prior to each entry. Arguably, the entries reflecting four hours of vacation time were each taken in conjunction with the half-days worked, which have already been included in the 198 days reflecting regular hours. Accordingly, I decline to count the foregoing entries as additional days worked.

On December 25, 2002, Claimant was paid for 48 hours of "regular" time and the entry reflects a pay period ending on December 15, 2002. However, the daily wage records also contain individual entries for each day in the December 15, 2002 pay period. I find the December 25, 2002, wages arguably represent a bonus. Accordingly, I decline to include the 48 hours or the entry in the number of days worked. However, I find the $785.76 reflected in the entry should be included in Claimant's yearly earnings, as it arguably comports with the definition of a wage. The money was compensation received by Claimant from Employer that was readily ascertainable or calculable. Further, I find that taxes were arguably withheld from the $785.76 payment, as the record does not indicate otherwise. Finally, I find the realized payment is not merely a "fringe benefit."

One entry dated June 8, 2003, indicates that Claimant was paid 14 hours of vacation time. Unlike the foregoing entries, the daily wage records do not show that Claimant was absent from work in the week before or after June 8, 2003. The parties have not provided any explanation or reason for the payment of 14 hours of vacation time; therefore, the 14 hours and the entry will not be included as days worked and the $236.88 earned will not be included in Claimant's yearly earnings.

Claimant testified that she received a payment of $3,000.00 in the year preceding her July 25, 2003 injury. I find no record evidence to support a conclusion that the payment represents compensation to Claimant for services rendered by her to Employer. According to Claimant, payments of $3,000.00 were offered to all employees as encouragement to accept a contract

[28] The six entries are dated August 11, 2002; January 12, 2003; March 2, 2003; April 13, 2003; May 11, 2003; and June 29, 2003.

and avoid a strike. It was an across-the-board payment and she was not guaranteed additional payments in the future.

Because there was no guarantee that the payment would recur in the future, I find it does not represent an amount which affects Claimant's earning capacity and further find that including the payment in the calculation would inflate her average weekly wage beyond what she would be reasonably expected to earn in the future. See Siminiski v. Ceres Marine Terminals, 35 BRBS 136 (2001). (Board declined to include a one-time GAI payment of $4,000.00 in the calculation of average weekly wage). Further, I find the payment is not compensation for services rendered by Claimant to Employer because the $3,000.00 was an "across-the-board" payment received by all workers. Accordingly, I agree with Employer that the one-time $3,000.00 payment should not be included in Claimant's gross income for the calculation of average weekly wage.

Based on the foregoing, I find and conclude Claimant worked 217 days[29] in the year preceding her injury and earned a total of $30,536.98. ($33,773.86 - $3,000.00 = $30,773.86; $30,773.86 - $236.88 = $30,536.98). According to Section 10(a), Claimant's total earnings of $30,536.98 should be divided by the 217 days worked, which results in an average daily wage of $140.73. The average daily wage is multiplied by 260 for a five-day worker ($140.73 x 260 = $36,589.80) and divided by 52 weeks, which results in an average weekly wage of $703.65. ($36,589.80 ÷ 52 = $703.65).

F. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For

[29] Based on the findings set forth in this discussion, Claimant worked 198 days earning wages for "regular hours" and was paid for a total of 19 vacation days. (198 days + 8 vacation days + 5 vacation days + 6 vacation days = 217 days worked).

medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

As previously discussed, I find Claimant's knee conditions are related to her July 2003 work injury. Based on his credentials, I find Dr. Dyas is a "qualified physician" who has treated Claimant for many years prior to her 2003 work injury and who has provided continued treatment to Claimant since her 2003 work injury. Because Dr. Dyas is a "qualified physician," and in the absence of any contrary medical evidence, I find and conclude any treatment provided by him or recommended by him is arguably reasonable, necessary, and appropriate. I have already found and concluded that any worsening of Claimant's condition was the natural and unavoidable result of her work-related injury. Accordingly, I find and conclude Employer is liable for all reasonable and necessary medical treatment for her knee injuries of July 25, 2003.

Based on the foregoing, I find and conclude Employer is liable for all past and future reasonable and necessary medical expenses arising from Claimant's July 25, 2003 injuries to both knees.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending

compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, it is not clear from the record whether Claimant lost wages as of the date of her injury or whether she maintained employment until August 18, 2003. Due to the absence of clarifying information on this matter and because Claimant requests disability benefits beginning on August 18, 2003, I find that Claimant was first due compensation on August 18, 2003. Employer filed its first notice of controversion on August 25, 2003. Employer filed subsequent notices of controversion on August 26, 2003; December 4, 2003; May 11, 2004; and August 6, 2004. (EX-9).

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of her injury or compensation was due.[30] Thus, Employer was liable for Claimant's total disability compensation payment on September 1, 2003. Because Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by September 15, 2003 to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer did file a timely notice of controversion on August 25, 2003 and is not liable for Section 14(e) penalties.[31]

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal

[30] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

[31] At formal hearing, Claimant raised the issue of penalties and argued Employer did not provide issue specific controversions. Claimant contended Employer was not protected if another issue arises and it fails to file an additional controversion or a timely amendment. Although Claimant pointed that there were issues dealing with whether benefits were due and average weekly wage, she failed to further address the penalty issue in her post-hearing brief. Without further guidance from Claimant as to when these issues were actually raised and how Employer's controversions were inadequate, I find, under these circumstances, that the imposition of a Section 14(e) penalty would be improper.

Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed percentage rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[32] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

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[32] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **September 14, 2004**, the date this matter was referred from the District Director.

1. Employer shall pay Claimant compensation for temporary total disability from August 18, 2003 to December 28, 2003, based on Claimant's average weekly wage of $703.65, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer shall pay Claimant compensation for permanent total disability from December 29, 2003 to March 15, 2004, and from September 28, 2004 to present and continuing based on Claimant's average weekly wage of $703.65, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer shall pay Claimant compensation for permanent partial disability from March 16, 2004 to September 27, 2004, based on two-thirds of Claimant's average weekly wage of $703.65, in accordance with the provisions of Section 8(c)(2) and 8(c)(19) of the Act. 33 U.S.C. § 908(c)(2) and §908(c)(19).

4. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's July 25, 2003, work injury, pursuant to the provisions of Section 7 of the Act.

5. Employer shall receive credit for all compensation heretofore paid, as and when paid.

6. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

7. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 7th day of February, 2006, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge